

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 456 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.PARIKH

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
 2. To be referred to the Reporter or not?
 3. Whether Their Lordships wish to see the fair copy of the judgement?
 4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the Civil Judge?

DILIPBHAI MANILAL SHAH

Versus

BANK OF RAJASTHAN

Appearance:

MR MB GANDHI for Petitioner

MS SONALI R DESAI for Respondent No. 1

CORAM : MR.JUSTICE M.S.PARIKH

Date of decision: 23/04/99

ORAL JUDGEMENT :

Rule. Service of rule is waived by Ms.Sonali R. Desai, learned advocate for the respondent.

2. Heard. The present Revision Application arises from the order dated 19th February 1999 rendered by the learned Judge of the City Civil Court, Ahmedabad, Court No.16, below Civil Misc. Application No.178 of 1998. The facts which can be gathered from Civil Misc. Application No.178 of 1998 are :

The respondent- Bank of Rajasthan is the original plaintiff- decree holder who filed Civil Suit No.235 of 1986 in the City Civil Court against the present applicant (whose description as to the name and address being contested) for recovery of Rs.8,04,197.45. The suit was partly decreed against the defendants on 5.8.1994. This has resulted into filing of execution petition being No.273 of 1996 against defendants nos.1 to 4 as also against defendant no.5 (with a dispute as regards description as aforesaid). On 16.1.1998, jungam warrant was issued and under the circumstances set out in Civil Misc. Application No.178 of 1998, the petitioner had an occasion to give a cheque dated 4.2.1998 for Rs.25,000/- and thereafter to move Civil Misc. Application No.178 of 1998 under Order XXI, Rule 58 of the Code of Civil Procedure ("the code" for brevity). The applicant did not allow the cheque being honoured. However, it has been the case of the applicant that summons were not duly served upon the applicant and the suit proceeded ex parte inasmuch as the applicant was not correctly mentioned in the cause title of the plaint.

"Dilipbhai Manilal Sheth" was shown as defendant no.5 (who was stated to be the applicant whereas the applicant's name is "Dilipbhai Manilal Shah"). In that view of the matter it was contended before the trial court that the decree was not binding to the applicant who also had an occasion to file Civil Suit No.1747 of 1998 for setting aside the decree. The respondent Bank contended that the applicant had engaged an advocate in the suit and merely because he did not remain present when the suit was called out, it could not be said that the decree was ex parte as suggested by the applicant. The matter was argued before the trial court and the trial court comparing the signatures of the applicant on different papers came to the conclusion that there was a mistake committed in describing the surname as 'Sheth' for 'Shah', through oversight and that Shri A.J. Pandya, learned advocate appearing for the applicant having failed to present the case of the applicant decree was passed. The applicant was also shown as partner of defendant no.1- firm. The trial court also took into consideration the fact that notice issued prior to filing of the suit was replied by the defendants (including the applicant) through advocate Shri A.J. Pandya on 9.1.1986. Under such circumstances the trial court dismissed Civil Misc. Application and vacated the ad interim relief granted in the said Civil Misc. Application.

3. I have heard the learned advocates for the

parties before this Court. The question in the application moved before the trial court under Order XXI, Rule 58 of the Code before the City Civil Court was as to whether the applicant was the same person as described as defendant no.5 in the suit. The decree was passed against him as if he was an altogether different person unconcerned with the suit as well as defendant no.1- firm of whom he was described to be a partner. In my opinion, the application under Order XXI, Rule 58 of the Code ought to have been tried as if it is a suit and the parties ought to have been permitted to adduce evidence instead of disposing of the same on mere comparison of signatures. That task could have been undertaken at the final disposal of the application under Order XXI, Rule 58 of the Code.

4. Besides, the applicant has also shown before this Court his willingness to deposit Rs.25,000/- on or before 16th June 1999 and to file undertaking to that effect before this Court. He has also shown his willingness to file undertaking to the effect that the flat in Nilam Apartment, Paldi, wherein he has been staying being of his ownership, will not be transferred till Civil Misc. Application No.178 of 1998 is decided by the trial court. Having shown such willingness, when this order is in progress, such undertaking is also tendered before this Court. The undertaking reads as under :

"I, Dilip Manilal Shah, petitioner herein do
hereby state on solemn affirmation as under :

1. That I undertake to pay/ deposit in Court
Rs.25,000/- twenty five thousand on or before
16.6.1999.
2. I further state and undertake that
property viz., 1, Nilam Apartment, Paldi is of my
ownership and till the Misc. Application No.178
of 1998 is decided by trial court/ Executing
Court, I will not transfer the same.

What is stated above is true."

5. I have heard the learned advocate appearing for the respondent. She could not dispute the fact that no oral evidence has been adduced before the trial court and that the trial court has decided the matter only on the contentions of the parties and comparison of the signatures. She submitted that it was quite within the powers and jurisdiction of the trial court. However, it

is the fact that the evidence has not been adduced before the trial court and from the record it appears that there was no opportunity for the parties to adduce evidence in support of their contentions. In view of the facts and circumstances, more particularly when the petitioner has filed undertaking before this Court, as aforesaid, following direction is required to be issued.

6. The impugned order is set aside. The trial court will rehear the Civil Misc. Application No.178 of 1998, after permitting the parties to adduce evidence in the said application and decide the same in accordance with law as expeditiously as possible. It is made clear that this order will not preclude the respondent- Bank from executing decree against the rest of the defendants. It is also made clear that filing of the undertaking by the petitioner is one of the reasons why this Revision Application is allowed and the petitioner will honour the undertaking filed before this Court. He has been made aware of the consequences of committing breach of the undertaking, so submits Shri M.B. Gandhi, learned advocate for the petitioner.

7. The proceedings undertaken by the respondent-Bank under sec.138 of the Negotiable Instruments Act will be withdrawn by the respondent upon the petitioner depositing the amount as stated in the undertaking.

8. Rule is made absolute in aforesaid terms with no order as to costs.

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